STATE OF MICHIGAN
IN THE SUPREME COURT

COVENANT MEDICAL CENTER, INC., Plaintiff-Appellee,	Supreme Court No. 152758
vs.	Court of Appeals No. 322108
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	Saginaw County Circuit Court No. 13-020416-NF
Defendant-Appellant.	

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BRIEF OF AMICUS CURIAE CITY OF DETROIT IN SUPPORT OF DEFENDANT-APPELLANT

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INTEREST OF AMICUS CURIAE

The City of Detroit files this *amicus curiae* brief as of right, pursuant to MCR 7.312(H)(2). The City is a political subdivision of the State of Michigan and the City's Corporation Counsel is its authorized legal officer. Section 7.5-201 of the Detroit Home Rule Charter provides "The Law Department is headed by the Corporation Counsel who is the duly authorized and official legal counsel for the City of Detroit and its constituent branches, units and agencies of government." Moreover, as shown below, the City has a significant interest in the subject of this appeal.

The City of Detroit operates the state's largest public transportation system. There are 2,477 vehicles in the City's rolling stock including vehicles for police, fire, EMS, public works, and public transportation. The Detroit Department of Transportation (DDOT) operates three hundred and twenty (320) buses that carry over 500,000 customers per week and carried roughly 25 million passengers in 2015. DDOT ticket revenue covers roughly 17% of DDOT's operating expenses.

Because commercial insurance is unavailable at a reasonable cost, the City self-insures for all vehicle liabilities including no-fault. For most injured DDOT passengers, the City is responsible for providing no-fault benefits. MCL 500.3114. The City, through its third party administrator, has, since October 1, 2014, paid out

roughly $11 million in PIP benefits – roughly $9 million of which went to providers.

Over and above those non-litigation payments, the City is sued at an alarming rate in cases where there is a dispute as to the necessity or reasonableness of a medical service or the price. Currently, the City has 313 open motor vehicle accident lawsuits pending, which include 118 provider only no-fault lawsuits. The dramatic increase of provider no-fault lawsuits in the past several years has materially increased the number, burden and cost of no-fault litigation.

ARGUMENT

The City agrees with appellant's legal analysis. The unambiguous language of the no-fault statute rejects provider standing.

Appellee argues that "[H]ealthcare provider claims and the court of appeals ruling further the purposes of the no-fault act." Covenant's brief, pp. 46 – 47. To the extent this Court deems public policy and legislative intent relevant to this case, they fully support appellant's position.

I. Medical provider lawsuits increase the number, cost and burden of no-fault lawsuits, contrary to public policy and legislative intent.

A. Legislative intent underlying the no-fault act – reduce litigation and costs associated with non-severe injury cases.

The no-fault act took effect in 1973. Its purpose is to ensure that individuals injured in automobile accidents obtain insurance benefits for medical expenses and wage loss without regard to whether the injured individual was at fault. To obtain such benefits, all automobile owners are required by law to purchase personal protection insurance (PPI or "first party" coverage). Under first party coverage, the injured party's own insurer pays benefits for medical services, wage loss and certain expenses.

It was believed that savings arising from eliminating costly litigation could allow for certainty of payment while maintaining affordable premium levels. *See, e.g. Shavers v Attorney General*, 402 Mich 554, 578 (1978); *Lewis v DAIIE*, 426 Mich 93, 101-102 (1986), ("One of the important reasons behind the enactment of the no-fault system was the reduction of auto accident litigation."). Likewise, in *Cassidy v McGovern*, 415 Mich 483, 499 (1982), this Court observed:

> "Through the insurance made compulsory under the act, the Legislature assured adequate recovery without regard to fault for economic losses. Medical expenses are covered, as are basic wage losses. **By specifying who is to pay and how much is to be paid, litigation concerning these matters generally becomes unnecessary, especially since negligence is no longer an issue.** The problem of undercompensating serious injuries is remedied to the extent that recovery for economic loss is assured." Emphasis added, footnotes omitted.

In *Advocacy Organization for Patients and Providers v Auto Club Insurance Organization,* 257 Mich App 365, 378 (2003), aff'd by 472 Mich 91 (2005), the

court of appeals quoted the following language from *McGill v Automobile Ass'n of Michigan*, 207 Mich App 402, 407 - 408 (1994):

> "It is to be recalled that the public policy of this state is that `the existence of no-fault insurance shall not increase the cost of health care.' Indeed, '[t]he no-fault act was as concerned with the rising cost of health care as it was with providing an efficient system of automobile insurance.' To that end, the plain and ordinary language of § 3107 requiring no-fault insurance carriers to pay no more than reasonable medical expenses, clearly evinces the Legislature's intent to "place a check on health care providers who have 'no incentive to keep the doctor bill at a minimum.' "

B. Providers have enormous financial incentives to treat, and over-treat, no-fault patients. This has resulted in an explosion of first party litigation contrary to public policy and legislative intent.

In the 1982 *Cassidy* decision, quoted above, this Court observed that litigation concerning first party claims should be "unnecessary." Today, as in 1982, the no-fault act continues to require prompt payment of properly supported first party claims, without regard to fault, with enforcement via threats of 12% interest and attorney fees. But litigation surrounding no-fault claims has exploded, particularly in the City of Detroit. Residents are incessantly solicited by lawyers' ads on city buses, highway billboards, television and radio, etc. Individuals involved in even a minor bus or motor vehicle accident in the City - including, recently, several City law department employees - routinely receive unsolicited in-

person solicitations from lawyers' representatives claiming to be their "medical case manager" or some such.

The reason is simple: this business has become incredibly lucrative both for medical providers and lawyers. The primary reasons are (i) medical providers have been able to collect exponentially more money from no-fault patients, than from other patients, for the same service, and (ii) the Michigan no-fault act provides unlimited medical benefits.[1]

Here is the reason medical providers are able to collect a much higher price for services rendered to no-fault patients:

Medical providers establish a "retail charge," or "billed charge," for their services. Providers are free to set their charges at any level, and increase their charges at any time and for any reason. But for the vast majority of their business, a provider's charge is utterly meaningless. Almost all payers for medical services, such as Blue Cross and other commercial insurers, and governmental insurers such

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[1] Obviously, the no-fault act's provision of unlimited medical benefits is a legislative and not judicial issue. However, the Court should be aware that of the 12 states that use a no-fault system, Michigan is the only one that provides unlimited medical benefits. The next highest is New Jersey which caps benefits at $250,000. See exhibit 1.

Detroit Mayor Michael Duggan has proposed legislation that would give Detroiters the option of buying lower cost no-fault insurance with limited benefits in line with those provided by New Jersey. Ex. 2 is an actuarial analysis of the proposed legislation.

as Medicare and Medicaid, completely disregard the provider's charge. Rather, such payers typically compute the payment based on schedules reflecting the cost and complexity of the service, which produce payments much less than provider charges.

One frequently used resource sets prices based on "diagnostic related groups," or DRGs. In the late 1980's Medicare switched from reimbursing hospitals based on actual treatment costs, which were subject to abuse, to diagnostic related groups: "DRG cost schedules base reimbursement on national and regional average costs for the treatment of particular illnesses, regardless of an individual hospital's actual treatment costs, * * *." *Little Company of Mary Hosp v Shalala*, 994 F Supp 950, 954, 955 (ND Ill, 1998), aff'd 165 F 3d 1162 (7th Cir 1999). DRGs resulted in significantly lower reimbursements, including, for example, those for lenses inserted during cataract surgery (IOLs): "The implementation of medical cost containment measures such as diagnostic related groups (DRGs) has exerted significant downward pressure on IOL prices. While in the past it was not untypical for a hospital or clinic to mark-up IOLs for resale anywhere from fifty to three hundred percent, under the DRGs the maximum mark-up is expected to be twenty percent or less." *Surgidev Corp v Eye Technology, Inc*, 648 F Supp 661, 671 (D Minn, 1986), aff'd 828 F 2d 452 (8th Cir 1987).

The one line of Michigan medical providers' business where billed charges become relevant is no-fault. No-fault insurers are allowed some latitude to contest the reasonableness of provider charges. However, no-fault insurers, including the city of Detroit, routinely pay medical providers at rates 2 to 5 times more than providers are paid for the exact same service where the injury did not arise from an automobile accident.

This result has evolved from decades old court of appeals' decisions in which providers argued that amounts paid by third party payers such as Blue Cross are not relevant to determining a "reasonable charge" under the no-fault statute. See, *Mercy Mt. Clemens Corporation v Auto Club*, 219 Mich App 46 (1996), *Munson Medical Center v Auto Club*, 218 Mich App 375 (1996), and *Hoffman v Auto Club*, 211 Mich App 55, 111-114 (1995). To the extent those cases can be read as providers' argue, those cases, like the court of appeals' provider standing cases at issue in this appeal, ultimately should not survive review by this Court. But the current data is astounding.

Exhibit 3 is an October 2013 study by the Citizens Research Council of Michigan. Page 7 compares amounts collected by medical providers for several common services. It shows, for example, that for a 15 minute physical therapy session, providers on average collect $79.38 if the patient was injured in an auto accident and has no-fault insurance, versus $30.66 paid by Medicare for the same

service. Other services have an even greater disparity – no-fault insurers on average pay $1,820.09 for a neck CT, versus $261.50 if Medicare is paying.

The disparity has only grown since 2013. The City was recently sued by Silver Pines Imaging, LLC. The complaint is appended as exhibit 4. Silver Pines is a frequent flier in the City's no-fault litigation. In its latest lawsuit, Silver Pines alleges that the City's third-party administrator severely underpaid Silver Pines for certain MRIs.

The complaint appends a chart (last 2 pages of exhibit 4), evidently compiled by Silver Pines' lawyer from an unknown source, which purports to show customary prices for MRIs. The chart identifies the alleged "customary price" for a brain MRI as **$3,500** at Huron Valley Sinai hospital, and **$4,500** at Sinai Grace.

Huron Valley and Sinai Grace both are part of the Detroit Medical Center (DMC). DMC posts "imaging cash prices" on line. Exhibit 5. **DMC's cash price for a brain MRI is $919**. Basha, another well-known MRI provider, **posts a cash price for a brain MRI as $400.** Exhibit 6.

Silver Pines' lawsuit seeks to recover payment exponentially higher than what other providers collect for the same service. It is perfectly obvious why Silver Pines is happy to pay a lawyer to seek a windfall recovery.

The City is routinely sued by entities that transport no-fault patients between their residence and their physician's office. See exhibit 7, lawsuit by "Get Well Transport." Based on depositions in prior lawsuits, the City has discovered that these entities typically use vans that offer no medical services. They are essentially taxi cabs, except that where taxis typically transport one passenger at a time, these vans typically transport multiple patients at one time and make frequent stops to pick-up and drop off passengers.

These transport services routinely charge the City more than $100 per passenger transport, regardless of distance and regardless of number of patients transported at the same time. The entire business model is premised on abuse of the no-fault system, facilitated by provider standing. But dealing with these sorts of lawsuits – regardless of the outcome – consumes scarce City resources.

In short, because the no-fault business is so lucrative, and benefits are unlimited, there are enormous incentives to treat and over-treat no-fault patients. Exhibit 8 is an April 2011 no-fault study by the Michigan Chamber of Commerce. It notes that excessive costs often arise "from the deliberate overuse of benefits or from the filing of fraudulent or exaggerated claims." Ex. 8, p. 17. The study also points out that the rate of alleged brain injuries in auto accident victims is 8 times higher in Michigan than in other states. Ex. 8, pp. 19-20.

C. A recent case study further illustrating the problem.

Aida Talley recently sued the City following a minor bus accident. Exhibit 9 is a photo of the almost undetectable scratch on the driver's side bumper of the bus resulting from the accident. The driver attested that no-one was injured. But, as is inevitable after any City bus accident, several passengers, using attorneys and medical providers that frequent these cases, sued the City.

Talley, in addition to making first party claims, alleged serious impairment of her head, neck, legs, and back. She claimed she could not work or care for herself and billed the City nearly $100,000 in first party claims.

Because of this flood of litigation the City has been forced to use the services of surveillance contractors. The City's contractor videoed Talley and her acquaintance (who was also on the bus and made similar claims against the City) engaged in what appears to be a domestic dispute. Talley can be seen driving, running, punching, kicking, biting and arguing with her acquaintance. In a dramatic stretch of footage, Talley was filmed clinging to the back of her acquaintance's car as it is driving. Still photos are appended as exhibit 10. Based on the video evidence, the trial court granted the City's motion for security of costs and the case was later dismissed.

Defending these cases is at best difficult. Providers claim to rely on patients' unverifiable claims of pains and headaches to prolong treatment and prescribe such expensive amenities as attendant care – typically provided by a relative. And even

beyond outright fraud, overtreatment and overbilling are endemic, costing the City millions of dollars annually.

D. The result – runaway litigation.

These are state-wide issues but the problem has become an unmitigated disaster for the City of Detroit. Accident collision claims are roughly the same as between the City and surrounding areas. Ex. 11. But Detroiters – urged on by lawyer solicitations – file twice as many first party no-fault claims as suburbanites (12 per 1,000 exposures vs. 6 per 1,000 exposures). Exhibit 11 and exhibit 2, Pinnacle actuarial analysis, p. 6. Each first party claim in Detroit costs, on average, roughly twice as much as in the suburbs ($59,000 vs. $30,000). Id. The $59,000 figure is itself extraordinary. That amount is more than the total benefit cap imposed by each of the 12 no-fault states, except New Jersey ($250,000) and Michigan (unlimited). Ex. 1.

Incredibly, on a per capita basis, first party no-fault lawsuits are filed 7.75 times more frequently in Wayne County than in Oakland County Circuit Court, and 5.2 times more frequently in Wayne County than in Macomb County Circuit Court. Ex. 12. Many provider lawsuits are filed in district court, and those cases do not even appear in the circuit court data cited above.

II. The devastating impact to the City.

The City of Detroit suffers in two important ways from runaway no-fault litigation. First, as described above, the City of Detroit's third-party administrator pays out millions of dollars in no-fault claims annually. And when there is a dispute as to the necessity of certain treatment or the reasonableness of the charges, the City is sued at an alarming rate. Provider lawsuits have dramatically increased the number, cost and burden of no-fault lawsuits against the City. Because ticket revenue covers only about 17% of DDOT's operating expenses, and the City is self-insured, every dollar paid out in no-fault litigation is one less dollar available to hire a police officer or firefighter, or for other core City services.

Second, as a direct result of excessive no-fault litigation costs, auto insurance rates in Detroit are the highest in the nation. It has been reported that more than 50% of Detroit drivers cannot afford insurance and, under the no-fault law, they become criminals when they drive without insurance. Exhibit 13, November 2014 Detroit Free Press Article.

These unaffordable rates deter people from moving to, and deter growth and development in, the City. They are a barrier to employment because sixty percent (60%) of Detroiters are employed outside City limits, necessitating access to a car when bus routes are unavailable. Additionally, it serves as a bar to employment from employers who note that the job applicant has a misdemeanor conviction for no insurance.

As this Court knows, the City recently emerged from bankruptcy under a plan of adjustment approved by the bankruptcy court. The voluminous bankruptcy record recites in detail the City's enormous problems in providing citizens with proper public safety services and dealing with abandoned properties, blight, and other basic quality of life issues.

United States Bankruptcy Judge Steven Rhodes, who presided over the case, ultimately found the plan of adjustment to be "feasible." But the Judge and his appointed feasibility expert acknowledged that the City's prospects for success in complying with the plan were by the narrowest of margins. See confirmation opinion in *In re City of Detroit*, 524 B.R. 147 (U. S. Bankruptcy Court, E.D. Mi.) at pages 219 ("little space remaining on the continuum of [feasibility]"); page 220 (City was and remains "enmeshed in a financial crisis of unsurpassed proportions and complexity"), page 231 ("narrow margin for error" for City to successfully exit from bankruptcy), page 242 (Mayor Duggan testified that the City is "probably about ten percent of where we need to be" in terms of providing adequate City services * * *).

These runaway lawsuits are a perfect storm for Detroiters. They continue to drive up the cost of already unaffordable premiums resulting in more uninsured drivers. Moreover, they drain resources from the City's general fund, making it

harder to provide City services to residents, and harder to comply with the City's plan of adjustment.

CONCLUSION AND RELIEF

The no-fault act does not give providers standing to sue. Allowing such standing would materially increase the number, cost and burden of no-fault lawsuits, contrary to legislative intent and public policy. The City asks that the Court rule that providers have no standing to bring no-fault lawsuits.

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